BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JESSICA A. BERUBE, Claimant, v. WELCO OF IDAHO, Employer, and LIBERTY NORTHWEST INSURANCE, Surety, Defendants.	)	**IC 03-523902** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed January 6, 2006

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to the Commissioners for hearing. On May 17, 2005, Commissioners Thomas E. Limbaugh, James F. Kile and R.D. Maynard conducted a hearing in Sandpoint, Idaho. Claimant was present and represented by Joseph E. Jarzabek of Sandpoint. Scott Harmon of Boise represented Defendants. Documentary and oral evidence were presented at the hearing. Pre-hearing depositions of Claimant, Dwayne Lund and J. Craig Stevens, M.D., were taken. A post-hearing deposition of Michael DiBenedetto, M.D., was also taken. Following submission of post-hearing briefs by the parties, the case came under advisement and is now ready for decision.

ISSUES

By agreement of the parties, the issues to be decided as a result of the hearing are:

1. Whether Claimant sustained a work-related accident and injury;

2. Whether Claimant's condition is causally related to the accident or is the result of a preexisting or subsequent condition;
3. Whether Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432, and the extent thereof; and
4. Whether Claimant is entitled to temporary partial and/or temporary total disability benefits, and the extent thereof.

CONTENTIONS OF THE PARTIES

Claimant contends she was injured while working for Welco of Idaho on November 12, 2003. Claimant argues she received, and passed, a physical when hired by Welco, proving she was able to do her job prior to the alleged injury of November 12. Finally, Claimant states the opinion of Dr. Stevens is to be discounted as he does nothing more than find claimants to be "fakes" and "malingerers."

Defendants contend Claimant's injury was not a result of her work with Employer. Defendants infer Claimant's pertinent injury may be the result of any number of previous injuries sustained in a 1993 automobile accident, a 2001 automobile accident, not to mention a broken collar bone sustained while playing ice hockey. Further, Dr. DiBenedetto's agreement that Claimant's interim work activities, performed after her alleged injury, could have created Claimant's symptoms should indicate Claimant's current symptoms are not derived from the alleged incident of November 12, 2003. Finally, Defendants contend Dr. DiBenedetto is mistaken when he links Claimant's injury to Employer. Defendants argue the reports of Dr. Stevens, a treating physician, are to be given more weight than those of Dr. DiBenedetto who did not see Claimant until a year after the alleged accident.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant; Joshua Moon; Ann E. Higgins; Lisa Inman; and Teresa Nolan;
2. Claimant's Exhibits 1 through 24 admitted at hearing;
3. Defendants' Exhibits A through P admitted at hearing, with Exhibit P for impeachment purposes only; and
4. The post-hearing deposition of Michael DiBenedetto, M.D.

After having considered all the above evidence and the briefs of the parties, the Commission issues the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. Claimant has been involved in sports and physical work her entire life. Claimant was in an automobile accident in 1993 involving a collision with a school bus. Claimant was also in an automobile accident in 2001 involving a collision between her large pickup truck and a smaller car. None of these incidents were symptomatic in Claimant's neck or left shoulder immediately prior to November 12, 2003.

2. Claimant was hired by Welco of Idaho, a lumber mill, on October 31, 2003. Claimant's primary task with Welco was to "pull green chain," a physical and very demanding job. According to the First Report of Injury as well as Welco's "Employee Hire" form, Claimant was earning $10.70 per hour with Employer. Employer had Claimant submit to a physical exam at the beginning of her employment to determine if she could perform the job for which she was hired. Dwayne Lund Deposition, p. 9, ll. 19-25; p.10, ll. 1-7; p. 13, ll. 15-23; and Hearing

Transcript, p.63, ll. 3-7. There are no medical records submitted to support this proposition, but neither are there any statements made by Defendants to discount this proposition.

3. On November 12, 2003, Claimant returned from a break at work and resumed her job activities. At that point in the day, Claimant was working on the "short chain," pulling different sized boards off of the chain and loading them onto carts. Working on the short chain is a faster paced activity than the "long chain" as employees have less time to remove boards from the chain and properly stack them in carts. Claimant testified that this activity involves a great deal of pulling, lifting and twisting. As Claimant twisted to place a stack of 1x8x8 boards onto a cart, she felt a pull in the "back" of her shoulder and "straight up" her back. Claimant immediately told her coworker that she had hurt her left shoulder. After some time spent waiting around the mill, Claimant left work due to the pain in her shoulder and back and was taken to the Bonner General Hospital emergency room where she was seen by Ken Gramyk, M.D. Dr. Gramyk opined Claimant had suffered an acute cervical myofascial strain. He also deemed the injury to be work related. Dr. Gramyk restricted Claimant's work activities with orders to engage in no twisting, no reaching, no pushing, as well as no pulling.

4. Following November 12, 2003, Claimant finished out the week and worked on November 13 and 14, a Thursday and Friday. Claimant also worked the week of November 17 through November 21. Employer was closed for inventory from November 23 through November 30. Claimant's last day of work for Employer was on December 1, 2003. On December 3, 2003, Dwayne Lund, Mill Superintendent, told Claimant that Welco did not have any suitable, light-duty work for her. Claimant has not worked for Welco since that date.

Medicals:

5. Following treatment at Bonner General, Employer instructed Claimant to begin seeing Dr. Stevens. Claimant visited Dr. Stevens on three occasions, November 17 and 24, 2003 and December 3, 2003. On November 17 Dr. Stevens indicated Claimant may have suffered a muscle strain "involving the left shoulder girdle and cervical paraspinals and trapezius," with a potential "cervical herniated nucleus pulposis (sic) and radiculopathy." Dr. Stevens limited Claimant's work with a 15 pound lifting restriction of the left arm and no repetitive reaching. Pursuant to an Employee Charting Note dated November 18, 2003, Dr. Stevens indicated Claimant suffered from a work-related left shoulder strain and cervical strain. Defendants' Exhibit E, 37. On November 24, Dr. Stevens noted Claimant should continue with the work restrictions of "a 50 pounds left restriction and not to do any repetitive reaching maneuvers." On December 3, Dr. Stevens ordered an EMG of Claimant's left upper extremity, subsequently opining Claimant exhibited "absolutely no objective findings." Dr. Stevens further opined there were no motor or sensory "deficits," and Claimant's strength and range of motion appeared normal. He went on to lift all of Claimant's work restrictions on December 3, 2003.[1] Claimant's Exhibit 15. Dr. Stevens has repeatedly asserted Claimant is not truly injured, but may be a malingerer, pursuing this claim for monetary benefit.

6. On December 2, 2003, prior to her last visit with Dr. Stevens, Claimant again visited the emergency room of Bonner General Hospital after her back locked up at home while getting ready for work. Claimant was seen by Juli Fung, M.D., who opined Claimant had suffered a lumbar strain unrelated to her work activities. Dr. Fung stated Claimant could return to work under the restrictions of "no prolonged sitting, but sitting work only."

[1] Although dated December 2, 2003, Claimant's Exhibit 15, 200 is clearly meant to read December 3, 2003. There are numerous occasions throughout the record where the date of December 3, 2003 appears as the correct date.

7. Claimant first saw Kathryn C. Robertson, FNP, on December 5, 2003 when Claimant visited Urgent Care in Sandpoint. Nurse Robertson noted cervical muscle spasms, left upper extremity neuropathy, a low back strain as well as anxiety and stress. In a December 29, 2003 report, Nurse Robertson stated Claimant was suffering from tenderness in the C5 through C7 region. Following a cervical as well as lumbar MRI in January of 2004, Nurse Robertson did note a "very mild annular bulge at C5-6" causing "partial effacement of the thecal sac anteriorly."

8. On January 15, 2004, Claimant received a neurosurgical consultation from Bret A. Dirks, M.D. Dr. Dirks noted that Claimant was unable to work since her back went out following a physical therapy session "sometime after Thanksgiving." After reviewing Claimant's MRI results, Dr. Dirks opined Claimant suffered from a cervical strain with a radicular component as well as a lumbar strain with a radicular component. He also released Claimant to light duty work with a restriction of no heavy lifting. Dr. Dirks made a note that Claimant "may" be released to regular duty one month from January 15, 2004.

9. Claimant was terminated from the employ of Welco on February 19, 2004. Pursuant to the deposition testimony of Dwayne Lund, Employer was not aware of any regular duty work release for Claimant at that point so Employer was unable to find suitable work for Claimant. There is some confusion as to whether Mr. Lund was referring to a work release for Claimant's cervical and shoulder strain or a work release for Claimant's lumbar strain. Irregardless, Employer felt there was no suitable work for Claimant as of February 19, 2004 so she was let go.

10. Throughout the summer of 2004, Claimant paid numerous visits to Greg Dutson, D.C. The records concerning these visits lack descriptive details, mostly noting Claimant's pain complaints and the various treatments attempted by Dr. Dutson.

11. In January of 2005, Claimant sought medical treatment from Dr. DiBenedetto. He opined Claimant's continuing neck and shoulder pain were a result of the November 12, 2003 incident. Dr. DiBenedetto further opined Claimant's lower back strain was not industrial in nature. Furthermore, Dr. DiBenedetto indicated conservative treatment should continue until failure. Upon the failure of conservative treatment, Claimant should receive a "Mumford type of procedure."

12. On January 7, 2005, Claimant was seen by Robert E. Rust, Jr., M.D. Dr. Rust noted Claimant's cervical strain was related to the November 12, 2003 incident. Dr. Rust went on to opine that Claimant's lumbar strain "seems to be, more-probably-than-not, related to the therapy she was receiving for that injury."

Other Findings:

13. Since the November 12, 2003 incident, Claimant has worked for employers other than Welco. Claimant worked for Snow Mass Alpacas as a ranch hand feeding animals and cleaning out stalls. Claimant also worked for Terry Williams Construction as a laborer. Most recently to the date of the hearing, Claimant had begun work with Northern Home Center as a delivery truck driver. Claimant testified all of these jobs caused her left shoulder to hurt at one time or another and she actually left Terry Williams Construction as she was physically unable to perform the job.

DISCUSSION

Injury and Causation:

1. The Idaho Workers' Compensation Law defines "injury" as a personal injury caused by an accident arising out of and in the course of employment. An "accident" is defined as an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the

industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury. An injury is construed to include only an injury caused by an accident, which results in violence to the physical structure of the body. Idaho Code § 72-102(17).

2. It is clear that Claimant suffered an injury. There exist no medical records prior to November 12, 2003 discussing a cervical or left shoulder strain. Drs. Gramyk, Stevens and Dirks all opined Claimant suffered from a cervical strain. Dr. Stevens also noted Claimant was suffering from a left shoulder strain. Nurse Robertson also noted Claimant suffered from cervical problems.

3. A claimant must prove not only that he or she was injured, but also that the injury was the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as "having more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). No "magic" words are necessary where a physician plainly and unequivocally conveys his or her conviction that events are causally related. *Paulson v. Idaho Forest Industries, Inc*, 99 Idaho 896, 901, 591 P.2d 143, 148 (1979). A physician's oral testimony is not required in every case, but his or her medical records may be utilized to provide "medical testimony." *Jones v. Emmett Manor*, 134 Idaho 160, 997 P.2d 621 (2000).

4. From the medical records provided, it is apparent that Claimant's cervical strain and left shoulder strain both resulted from the November 12, 2003 incident at Welco. The event causing Claimant's injury can easily be located as to time and place. Claimant signed and dated a First Report of Injury that was also signed by Dwayne Lund, Mill Superintendent. Furthermore, the job Claimant was performing is a very physical job involving a great deal of twisting, as well as lifting and pulling of boards.

5. Both Drs. Gramyk and Stevens note that Claimant's strains were work-related. Later, Dr. Stevens did go on to opine Claimant had no objective cause for her further symptoms and that she could be a malingerer. None of this changes the fact that both Drs. Gramyk and Stevens' initial impressions were of a work-related injury.

6. It is also noteworthy that Claimant passed a physical exam prior to the injury of November 12. In his deposition, Dwayne Lund testified he believed Claimant had received a physical exam pursuant to the policy of Employer. The record contains no contrary information about this examination. Thus, the Commission finds it telling that Claimant received a physical examination before the incident of November 12, 2003. No records appear to show Claimant suffered from any cervical or shoulder strain prior to November 12, 2003.

Medical care:

7. Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician immediately following an injury and for a reasonable time thereafter. It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make is whether the treatment was reasonable. *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989).

8. Claimant has shown causation and is, therefore, entitled to medical care for the cervical strain and left shoulder strain suffered on November 12, 2003. Employer/Surety is entitled to credit for any related medical expenses paid-to-date.

TTD/TPD benefits:

10. Idaho Code § 72-102(10) defines "disability," for the purpose of determining total or partial temporary disability income benefits, as a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided for in Idaho Code § 72-430. Idaho Code § 72-408 provides for income benefits for total and partial disability during an injured worker's period of recovery. "In workmen's [sic] compensation cases, the burden is on the claimant to present expert medical opinion evidence of the extent and duration of the disability in order to recover income benefits for such disability." *Sykes v. C.P. Clare and Company*, 100 Idaho 761, 763, 605 P.2d 939, 941 (1980); *Malueg v. Pierson Enterprises*, 111 Idaho 789, 791, 727 P.2d 1217, 1220 (1986). Once a claimant is medically stable, he or she is no longer in the period of recovery, and total temporary disability benefits cease. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 586, 38 P.3d 614, 621 (2001).

11. Once a claimant establishes by medical evidence that he or she is still within the period of recovery from the original industrial accident, he or she is entitled to total temporary disability benefits unless and until evidence is presented that he or she has been medically released for light work and that (1) his or her former employer has made a reasonable and legitimate offer of employment to him or her which he or she is capable of performing under the terms of his or her light duty work release and which employment is likely to continue throughout his or her period of recovery, or that (2) there is employment available in the general

labor market which the claimant has a reasonable opportunity of securing and which employment is consistent with the terms of his or her light duty work release. *Malueg*, *Id*.

12. Claimant has not provided sufficient evidence to show a decrease in wage-earning capacity. To the contrary, the records in the case show Claimant worked at her time of injury job immediately following her injury. It was not until December 3, 2003 that Claimant was unable to return to work for Employer. Employer told Claimant there was no suitable, light-duty work available following her lumbar-related restrictions of December 2, 2003, as given by Dr. Fung. Dr. Fung did not classify Claimant's lumbar strain as work-related. Dr. Rust is the only medical professional to attempt to link Claimant's lumbar strain to the physical therapy she received for her November 12 injury. Dr. Rust's opinion is conclusory without a medical explanation for the opinion. Any wage-loss due to the lumbar strain of December 2, 2003, is not compensable as the majority of medical evidence indicates the lumbar strain is non-industrial in nature.

Attorney Fees:

13. Idaho Code § 72-804 provides for an award of attorney fees in the event an employer or surety wrongfully denies or delays the payment of benefits. Claimant seeks attorney fees for Employer/Surety's wrongful denial of her claim. Surety had reasonable grounds for denying Claimant's claim based on the reports of Dr. Stevens. Claimant has not proven her entitlement to attorney fees.

CONCLUSIONS OF LAW

1. Claimant sustained a work-related accident and injury on November 12, 2003.
2. Claimant's cervical strain and left shoulder strain are causally related to the accident of November 12, 2003.

3. Pursuant to Idaho Code § 72-432 Claimant is entitled to all reasonable medical treatment relating to her cervical strain and left shoulder strain including future medical benefits. Defendants are entitled to credit for any related medical expenses paid-to-date.
4. Claimant has not proven her entitlement to income benefits.
5. Claimant has not proven her entitlement to attorney fees under Idaho Code § 72-804.

*** * * * ***

ORDER

Based on the foregoing, IT IS HEREBY ORDERED That:

1. Claimant sustained a work-related accident and injury on November 12, 2003.
2. Claimant's cervical strain and left shoulder strain are causally related to the accident of November 12, 2003.
3. Pursuant to Idaho Code, § 72-432 Claimant is entitled to all reasonable medical treatment relating to her cervical strain and left shoulder strain including future medical benefits. Defendants are entitled to credit for any related medical expenses paid-to-date.
4. Claimant has not proven her entitlement to income benefits.
5. Claimant has not proven her entitlement to attorney fees under Idaho Code § 72-804.
6. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this __6th__ day of January, 2006.

INDUSTRIAL COMMISSION

__/s/_____
Thomas E. Limbaugh, Chairman

_/s/_____
James F. Kile, Commissioner

_/s/_____
R.D. Maynard, Commissioner

ATTEST:
_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __6th_ day of January, 2006, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following persons:

JOSEPH E JARZABEK
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SCOTT HARMON
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__/s/_____